

NTSB Order No.
EM-142

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 24th day of July 1987

PAUL A. YOST, Commandant, United States Coast Guard,

v.

JACK P. LYONS, Appellant.

Docket ME-125

ORDER GRANTING MOTION

By Order EM-141, served April 27, 1987, the Board reversed the Coast Guard's denial of appellant's request for a temporary license pending his appeal to the Vice Commandant from a decision of a law judge finding proved a charge of misconduct; namely, the operation of a vessel while under the influence of an intoxicant. The Board concluded, inter alia, that the law judge's reliance on appellant's arrest history, which revealed two prior arrest for driving a motor vehicle while under the influence of an intoxicant was, in the absence of information in the record as to the ultimate disposition of the charges underlying the arrests, inappropriate on due process grounds. The matter was remanded to the Coast Guard with the direction that it either issue appellant a temporary document or provide a legally sufficient explanation for the apparent view that to do so would be "incompatible with requirements for safety at sea." See 46 CFR 5.707(c). Appellant has filed a motion contending that the Coast Guard has once again denied him a temporary document and has done so without providing an explanation consistent with the Board's order. He therefore asks that the Coast Guard be directed to issue a temporary document to him. We will grant the motion.¹

The law judge, in her May 29, 1987 denial of appellant's application for a temporary license (copy attached) concludes that appellant is likely to repeat the behavior that led to the Coast

¹The Coast Guard has filed a response in opposition to the motion.

Guard charge that she sustained.² The basis for her conclusion in this respect is the arrest history the Board in Order EM-141 indicated could not properly be relied on.³ Moreover, apart from the Board's express proscription of reliance on that information for purposes of denying appellant a temporary document, appellant in his motion points out that under the Coast Guard's own regulations a state or federal charge against a seaman that has not been fully adjudicated to a final judgment of conviction may not be considered for purposes of determining an appropriate sanction in a case in light of the seaman's prior record. See 46 CFR §5.565(a)(4). We think it selfevident that this regulations precludes consideration of unproved charges in the context of an application for a temporary license, since there is no justification for employing a lesser or different standard in considering such an application and because for the seaman the consequences of a denial are no different from the actual

²The law judge expresses the concern that appellant, due to the fact that he was involved in an auto accident before piloting the vessel which led to the Coast Guard charge against him, "showed that he can be dangerous, not only to himself but others"(Decision at 3). It seems to us that any individual whose faculties may be impaired by an intoxicant presents a hazard to others when operating a vehicle or vessel. The issue here was not whether appellant while intoxicated would present a risk to others, but whether the single incident of intoxication found proved precludes trusting him not to operate a vessel while intoxicated during the pendency of his appeal. Since the law judge did not revoke appellant's license she obviously believed that he could be so trusted, albeit, perhaps, not immediately. In these circumstances, it is difficult to avoid the conclusion that the law judge in effect has arbitrarily denied Appellant a temporary license in order to insure that he will serve a one year suspension notwithstanding the outcome of his appeal.

³The law judge claims support for such reliance in studies suggesting that the number of an individual's drinking-driver arrests may be of more predictive value in identifying problem drinkers than the number of his convictions on such charges. The law judge appear not to appreciate, among other things, that the issue before her is not controlled by the weight, for statistical purposes, psychologists or sociologists might attach to evidence of arrests alone. The issue, rather, was whether such evidence was legally sufficient for purposes of a ruling effectively depriving appellant of his livelihood. The Board in Order EM-141 clearly ruled that it was not. The law judge was bound by that ruling whether or not she differed with it.

imposition of a sanction suspending his license.

Inasmuch as the Coast Guard has not, consistent with Board Order EM- 141, provided a legally acceptable explanation for its conclusion that the issuance of a temporary license to appellant pending his appeal to the Vice Commandant would be "incompatible with requirements for safety at sea," the denial of appellant's application must be reversed.

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's motion to compel compliance with Board Order EM-141 is granted, and
2. The proceeding is remanded to the Coast Guard for the prompt issuance of a temporary document to appellant pending his appeal to the Vice Commandant.

BURNETT, Chairman, GOLDMAN, Vice Chairman, LAUBER, NALL and KOLSTAD, Members of the Board, concurred in the above order.